Supreme Court, U.S.
FILED
JUL 2 1992
OFFICE OF THE CLERK

No. 91-1744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GALAXY COMMUNICATIONS, INC.
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ANCHOR BROADCASTING LIMITED PARTNERSHIP IN OPPOSITION

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July 2, 1992

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QUESTIONS PRESENTED FOR REVIEW

Whether petitioner has shown cause for having the Court ignore the principle of *stare decisis* to consider the constitutionality of the FCC's minority preference, which was decided by this Court in Metro Broadcasting, Inc., 110 S. Ct. 2997 (1990).

Whether petitioner has shown that the questions it raises are of such imperative public importance as to issue a writ of certiorari when the Court below has not issued a final judgment and petitioner currently argues that it is entitled to have its application granted by the FCC irrespective of the opinion of the Court of Appeals.

Whether petitioner is entitled to raise its argument concerning the constitutionality of the minority preference when it did not make that argument before the Federal Communications Commission, and a statute requires exhaustion of administrative remedies as a condition precedent of judicial review.

Whether the determination that the award of integration credit to Anchor is supported by substantial evidence was correct when its partners did not refuse any order to answer a question.

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BRIEF FOR ANCHOR BROADCASTING LIMITED PARTNERSHIP IN OPPOSITION

Respondent Anchor Broadcasting Limited Partnership (Anchor) now opposes the petition for writ of certiorari filed by Galaxy Communications, Inc. (Galaxy) on April 30, 1992 and received by respondent on May 4, 1992.

OPINIONS BELOW

The relevant opinions are reproduced in the appendices to Galaxy's petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A pertinent statutory provision is 28 U.S.C. §2101(e) (1982), which reads as follows:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

A second pertinent statutory provision is 47 U.S.C. §405(a) (1991 Supp.), which reads as follows:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under Section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority, making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under Section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action,

or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which Section 402(a) of this title applies, or within which an appeal must be taken under Section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

STATEMENT OF THE CASE

The proceeding in question involves the applications of Anchor, Galaxy and Susan M. Bechtel (Bechtel) for a construction permit for a new FM radio station on Channel 250A at

Selbyville, Delaware. Those applications (along with several other applications that were subsequently dismissed) were designated for hearing before an Administrative Law Judge.

On July 24, 1989, the Administrative Law Judge released his decision granting Anchor's application. Pet. App. B 72a. The Administrative Law Judge ruled that Anchor and Galaxy were equal under the factor of diversification of mass media. Pet. App. B 89a. He also held that both applicants were entitled to full (100 percent) credit for their respective proposals to participate full time in station management (known as integration of ownership into management). *Id.* He also held that both applicants were entitled to credit for proposing auxiliary power. *Id.* Bechtel was deemed an inferior applicant because she received no credit for participation in station management. *Id.*

When an applicant receives credit for integration of ownership into management, the Federal Communications Commission (FCC) also examines certain factors that enhance the applicant's integration proposal. Those factors include an applicant's residence within the service area of its proposed station, its civic involvement in the service area, and its broadcast experience. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-396 (1965). As noted in *Metro Broadcasting, Inc.*, 110 S. Ct. 2997, 3004-3005 (1990), the FCC now considers minority ownership to be another "plus" when a minority owner proposes to participate in station management.

The Administrative Law Judge awarded Galaxy only very slight credit for local residence and civic involvement because its sole stockholder established a residence within its service area only after it filed its application. Pet. App. B 88a-89a. Anchor received credit for general partner Herman Stamps' status as a minority and for his proposal to establish a resi-

dence in the service area. Pet. App. B 87a. Galaxy and Bechtel also received very slight preferences over Anchor because they proposed to serve about twenty percent more people who already received five or more existing services. Pet. App. B 85a. The Administrative Law Judge granted Anchor's application because Anchor's credit for minority involvement and future local residence outweighed Galaxy's very slight credit for local residence and civic involvement and very slight comparative coverage advantage. Pet. App. B 89a.

The FCC's Review Board, an intermediate appellate body within the agency, reversed the Administrative Law Judge and granted Galaxy's application because it decided that Anchor was not entitled to credit for integration of ownership into management. Pet. App. B 29a. The full FCC then decided that Anchor was entitled to complete, 100 percent integration credit and reinstated the Administrative Law Judge's decision. Pet. App. B 16a. The FCC evaluated the testimony of Anchor's partners and found that they would comply with the standards for insulating the limited partners from control of the station. Pet. App. B 18a-21a. The FCC also rejected arguments that Mr. Stamps would not work at the station on a permanent basis and that he would not move to Selbyville. Pet. App. B 21a-25a. The FCC held that Anchor was the superior applicant because although both Galaxy and Anchor received full integration credit, Anchor's "enhancement for its minority ownership and future residence outweigh the very slight credit awarded Galaxy for local residence and civic activities and for its coverage proposal." Pet. App. B 26a (footnotes omitted). In a footnote, the FCC rejected Bechtel's argument that it should abandon integration of ownership into management as a basis for awarding construction permits. Pet. App. B 27a n.4.

Both Galaxy and Bechtel appealed the FCC's decision to the United States Court of Appeals for the District of Columbia

Circuit. As that Court noted, Galaxy's appeal emphasized its argument that Anchor was entitled to no integration credit. Pet. App. A 7a. The Court of Appeals rejected that argument. Pet. App. A 7a-9a. In doing so, it found, "...Dr. Stamps' allusions to the privilege against compulsory self-incrimination and to differences between the 'real world' and the partnership agreement can reasonably be regarded as the overly careful responses of a witness worried about unforeseen hypotheticals during cross-examination." Pet. App. A 9a n.5.

In a footnote, the Court of Appeals noted Galaxy's argument that Anchor's minority preference was unconstitutional "because it was the dispositive factor in Anchor's licensing victory in this case..." Pet. App. A 7a n.4. The Court declined to reach that argument because Galaxy did not make that argument before the FCC. *Id.*

Bechtel's appeal challenged the FCC's continued reliance upon the integration criterion in light of two subsequent policy changes. The Court of Appeals held that the FCC erred in failing to reach the substance of Bechtel's argument. Pet. App. A 11a-15a. It remanded the proceeding to the Commission with instructions "to respond to Ms. Bechtel's challenges and to consider her application in light of those challenges." Pet. App. A 15. It also held that if the Commission decided to change its policy, "it is free to do that however it wishes." *Id.*

Following the remand order, the applicants filed comments at the FCC's invitation. In its comments, which were filed on April 6, Galaxy urged that the Commission modify its criteria for choosing applicants in several respects. Galaxy's comments are reproduced as Appendix A to this opposition. Specifically, Galaxy suggests that (1) substantial credit for local residence be awarded regardless of whether the owners propose to be integrated into management, and (2) that an applicant proposing to cover fifteen percent or more greater

population than its competitors receive "a preference similar in weight to the integration criterion." App. A 3a. If the FCC adopted Galaxy's proposal and applied them to this proceeding, Galaxy could be the superior applicant regardless of whether Anchor received a minority preference. The FCC has not yet acted on the Court of Appeals' opinion or the applicants' comments.

SUMMARY OF ARGUMENT

This Court should refuse to issue the requested writ because the constitutional question for which Galaxy seeks review was recently decided by this Court in *Metro Broadcasting, Inc.*, 110 S. Ct. 2997 (1990). Galaxy's attempt to distinguish this case from *Metro* on the facts has no merit.

The opinion of the Court of Appeals is not a final judgment, and Galaxy has not shown that this case is of such public importance as to require immediate consideration. Indeed, Galaxy has urged revisions to the FCC's criteria for choosing broadcast applicants that could result in its application being granted regardless of whether Anchor receives a minority preference.

Galaxy waived its right to challenge the constitutionality of the minority preference by not making its constitutional argument before the FCC. The requirement that Galaxy exhaust its administrative remedies is mandatory in this case because the exhaustion requirement is contained in a statute. The exhaustion requirement applies to constitutional arguments. Moreover, the exhaustion requirement is particularly applicable in this case where the argument is directed against the FCC's own policy as opposed to a statute.

Galaxy's argument that Anchor's general partner refused to answer questions or invoked a privilege against self-incrimination is specious. Dr. Stamps never refused an order

of the Administrative Law Judge to answer a question. No such privilege was invoked, nor were any conceivable questions raised concerning criminal conduct by Dr. Stamps. The Commission and the Court of Appeals correctly concluded that Dr. Stamps' reference to self-incrimination was the natural response of a witness faced with hostile cross-examination.

REASONS FOR DENYING THE WRIT

A. Galaxy Has Not Shown Cause For Having This Court Consider A Question It Resolved Only Two Terms Ago.

1. Applicability of *Metro* and the *stare decisis* principle

In *Metro Broadcasting, Inc.*, 110 S. Ct. 2997, 3002 (1990), this Court held that the FCC's "program awarding an enhancement for minority ownership in comparative proceedings for new licenses" did "not violate equal protection principles." Galaxy now seeks to have the Court reconsider that exact same question. It would be a waste of the Court's scarce resources to consider the same issue twice in such a brief period. A grant of Galaxy's petition would also do violence to the doctrine of *stare decisis*.

This Court has repeatedly recognized "the central importance of *stare decisis* in this Court's jurisprudence." *Hilton v. South Carolina Public Railways Commission*, 112 S. Ct. 560, 569 (1991). In *Hilton*, Justice Kennedy noted, "Adherence to precedent promotes stability, predictability, and respect for judicial authority" and that the Court "will not depart from the doctrine of *stare decisis* without some compelling justification." *Id.* While *Hilton* involved a question of statutory interpretation, the Court noted in *Welch v. Texas Highways & Public Transportation Department*, 483 U.S. 468,

478-479 (1987) that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*" in constitutional cases as well as statutory cases.

The principle of *stare decisis* applies with particular force in this case. If the Court reversed its *Metro* holding only a short time after that decision was issued, it would necessarily raise questions about the stability and predictability of the law. In *Hilton*, the Court found *stare decisis* as an important justification for following a twenty-seven year old case. The justification for applying *stare decisis* to this question is particularly strong because *Metro* was decided very recently and because Galaxy has offered no new facts or rationale for overruling *Metro*.

2. Application of *Metro* to this case

Galaxy argues that the *Metro* holding does not apply to this case because while race was just one of many factors considered in *Metro*, Anchor allegedly received a *per se* preference based upon Dr. Stamps' minority status. Pet. 10-11. Galaxy's argument that Anchor received a *per se* preference is just plain wrong. Both the Administrative Law Judge's decision and the FCC's decision make clear that minority status was only one of many factors considered in granting Anchor's application. Pet. App. B 26a, 89a. Thus, if Galaxy had been successful in arguing (as it was before the Review Board) that Anchor was not entitled to credit for integration of ownership into management, Galaxy would have prevailed regardless of the minority status of Anchor's general partner. Anchor would not have received any minority enhancement in that case. Moreover, if Galaxy's principal had offered a more substantial record of local residence or civic involvement, it may have prevailed. The fact that Anchor's minority preference tipped the balance in its favor does not make the minority preference

a *per se* preference. Contrary to Galaxy's suggestion at Pet. 8-9, the FCC recognized in *Metro* that the minority preference was, by itself, a potentially decisional factor. *Metro Broadcasting, Inc., supra,* 110 S. Ct. at 3006. The Commission recognized that any advantages Galaxy had under local residence and civic involvement were very minor because its principal only moved to its service area after its application was filed. Pet. App. B 26a and 28a n.8.

At Pet. 11, Galaxy suggests that the FCC gives too much weight to the minority preference in comparison to the applicants' technical proposals. The FCC's policy is that coverage to areas that currently receive five or more signals is not as important as integration of ownership into management and qualitative attributes such as minority ownership and local residence. *Barton Broadcasting Co.,* 104 FCC 2d 785, 791 (Rev. Bd. 1986). On the other hand, an applicant that will serve underserved areas and populations can receive a substantial advantage, especially if the applicant will serve areas or populations that receive no broadcast service. *Washoe Shoshone Broadcasting,* 5 FCC Rcd 5561, 5564 (1990). None of the applicants in this case will serve any areas or populations that currently receive five or fewer services. Pet. App. B 74a. If it is constitutional to award a minority preference, the weight to be given that preference is clearly within the FCC's discretion to license applicants in the public interest. Galaxy's argument concerning the weight to be given an applicant's coverage proposal is also currently before the FCC pursuant to the Court of Appeals' remand. No reason exists for this Court to consider an argument that the FCC currently has under its consideration. The constitutionality of the minority preference in this case was squarely ruled upon in *Metro* and need not be decided again.

3. Galaxy's discussion of Bakke misstates the FCC's criteria for choosing applicants

Galaxy urges the Court to reconsider its holding in *Metro* because of an alleged distinction between the FCC's minority preference and the preference in issue in *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Pet. 12-15. This Court has considered the applicability of the diversity rationale in Bakke to the FCC's minority preference. *Metro Broadcasting, Inc., supra*, 110 S. Ct. at 3010-3011. Reconsideration of this same question only a few years later would do violence to the principle of *stare decisis*.

If the Court examines Galaxy's argument, however, it will discover that its argument is based upon a fundamentally incorrect premise. Galaxy urges that Justice Powell anticipated that race would only be one of many factors considered in an attempt to obtain diversity. Pet. 13. It then argues that the FCC's minority preference is fundamentally flawed because minority status is the only decisional factor that considers diversity. *Id.* An examination of the FCC's criteria, however, shows that several of those criteria measure an applicant's diversity. Thus, Galaxy's argument must fail.

This Court has noted that diversification of control of mass media communications is one of the criteria the FCC uses to choose among applicants. *Metro Broadcasting, Inc., supra*, 110 S. Ct. at 3004. When the FCC established its comparative criteria, it made diversification of mass media "a factor of primary significance..." *Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d at 394. It found, "Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Id.* (footnote omitted). In making that judgment, the FCC relied upon the First Amendment's " 'assumption

that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...' " *Id.* at 394 n.4, *citing Associated Press v. United States,* 326 U.S. 1, 20 (1945). Thus, the FCC has made diversity a central goal of its licensing scheme and has made diversity of ownership a primary comparative factor.

Other criteria used by the FCC to choose among applicants consider the diversity an applicant will offer. Proposed program service is one of the factors the Commission may look at in choosing between applicants. *Metro Broadcasting, Inc., supra,* 110 S. Ct. at 3004. An applicant that proposes a specialized programming format (*e.g.*, foreign language or minority-oriented format) may receive a preference if it can show a need for the format and that the format is not available in a substantial amount. *George E. Cameron, Jr. Communications,* 71 FCC 2d 460, 464-466 (1979). The award of a preference for such a specialized format represents an attempt to reward diversity.

Moreover, a non-minority applicant that believes it could show special sensitivity to minority needs and interests can attempt to obtain equal or greater credit than an applicant with minority ownership. In *TV 9, Inc. v. FCC,* 495 F.2d 929, 941 n.3 (Supp. Opn.) (D.C. Cir. 1974), the Court of Appeals invited applicants who were not minorities to prove that they could better serve "the public interest in promoting diversification of opinion and viewpoint..." In *San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 601-603 (Rev. Bd. 1983), the Commission's Review Board confirmed that such showings should be considered if they contain material and relevant evidence. Galaxy did not attempt such a showing in this case, but it had every opportunity to show that the "equities of the case" favored a grant of its application. It did not do so.

B. The Supreme Court Should Not Grant The Requested Writ Because The Court of Appeals Has Not Issued A Final Judgment And Galaxy Has Not Shown Cause For Consideration Of Its Appeal At This Time.

While this Court has the authority to review a case before a court of appeals has rendered judgment (28 U.S.C. §2101(e) (1982)), such a petitioner must show "that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court". S. Ct. R. 11. In this case, the Court of Appeals did not issue a final judgment. Instead, it remanded the proceeding. Galaxy's petition must be denied because it has not even attempted to show how its petition complies with this Court's Rules.

Prudential considerations support the denial of Galaxy's petition. In comments filed with the FCC after the Court of Appeals' remand, Galaxy and Bechtel have offered arguments that their applications should be granted regardless of whether Anchor receives its minority preference. If the Court issues a writ at this time, it would be considering a question that could become moot. This Court does not exist to consider questions that may not be meaningful in a case. Premature consideration of this case could be a waste of the Court's valuable resources.

Galaxy has not listed any benefits that would arise from early consideration of this case, and no such benefits are apparent. The question in issue does not rise to a question of "imperative public importance", especially since this Court has very recently resolved the precise constitutional question in issue. The question does not rise to the level of importance posed by the questions in *United States v. Nixon*, 418 U.S. 683 (1974), where early review was granted. The litigation does

not require an early resolution of the constitutional question. Issuing a writ at this time would represent an unwise use of this Court's resources without providing any benefits to the public or to the litigants. Accordingly, Galaxy's petition would have to be dismissed for failure to comply with S. Ct. R. 11 even if the petition would otherwise be granted.

C. Galaxy Waived Its Right To Challenge The FCC's Minority Preference By Not Exhausting Its Administrative Remedies

As noted above, the Court of Appeals did not reach the merits of Galaxy's constitutional challenge because Galaxy did not make that argument before the FCC. Pet. App. A 7a n.4. Galaxy challenges that ruling by arguing that the FCC was not competent to pass upon the constitutionality of the minority preference and because Congressional legislation would have made agency review a "futile exercise". Pet. 15-17. The Court of Appeals' ruling was correct because a statute required Galaxy to make its argument before the FCC and because the FCC is a competent agency to consider constitutional claims.

This Court has recognized two types of situations where a litigant is required to exhaust its administrative remedies by making all of its arguments before the agency. If a statute does not set forth an exhaustion requirement, "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme". *Patsy v. Florida Board of Regents*, 457 U.S. 496, 502 n.4 (1982). If Congress imposes an exhaustion requirement by statute, however, exhaustion of administrative remedies is mandatory. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989). Here, Galaxy was required to make its argument before the FCC because Congress set forth an explicit exhaustion requirement. 47 U.S.C. §405(a)

makes the filing of a petition for reconsideration "a condition precedent to judicial review" when a party "relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass". For reasons unknown, Galaxy never challenged the constitutionality of the minority preference at any level before the FCC. Indeed, Galaxy did not raise this issue before the FCC in its comments for remand. This Court has interpreted similar statutes to deprive a court of jurisdiction to consider an argument not raised before the agency absent extraordinary circumstances. *EEOC v. FLRA*, 476 U.S. 19, 23 (1986). Since Galaxy did not meet the "condition precedent to judicial review," the Court of Appeals correctly concluded that it could not consider Galaxy's constitutional challenge.

Galaxy suggests that the exhaustion of administrative remedies doctrine should not apply because the issue involved is constitutional. Pet. 16, *citing, inter alia, Johnson v. Robison*, 415 U.S. 361, 368 (1974). This argument suffers from several defects. First, Galaxy's argument is irrelevant because Congress established a specific and mandatory exhaustion requirement with no exception for constitutional arguments. Galaxy's argument would be relevant if this Court were deciding whether exhaustion was an appropriate requirement, but Congress has already made that judgment. Second, the United States Court of Appeals for the District of Columbia Circuit has demonstrated that the exhaustion requirement of 47 U.S.C. §405(a) applies to constitutional arguments. In *Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465, 470-471 (D.C. Cir. 1989), *cert. denied* 110 S. Ct. 757 (1990), the Court of Appeals ruled that a petitioner's constitutional arguments which had not been first presented to the agency were barred from subsequent judicial consideration by Section 405.

The cases cited by Galaxy are not applicable to this situation. *Weinberger v. Salfi*, 422 U.S. 749, 766-767 (1975) is inapplicable because the relevant statute setting forth the requirements for judicial review did not, unlike 47 U.S.C. §405(a), require that every question of law be presented before the relevant official (the Secretary of Health, Education and Welfare). Instead, the statute required a "final" decision. The Court noted that the statute gave the Secretary discretion to define a "final" decision so as to not require full exhaustion of administrative remedies on every question. Most significantly, the Secretary in *Weinberger* did not challenge the sufficiency of the claimant's attempts to exhaust administrative remedies. The Court interpreted the Secretary's actions to be a determination that a "final" decision existed and that judicial review was appropriate. Here, the statute specifically required that each question of law be presented before the FCC as a "condition precedent" of judicial review. Galaxy did not meet that condition precedent. Moreover, while the Secretary in *Weinberger* implicitly determined that the requirements for judicial review had been met, the FCC has challenged Galaxy's right to judicial review because Galaxy never made its argument before the FCC.

The other cases cited by Galaxy have no applicability to this situation. The issue of exhaustion of administrative remedies was not directly before this Court in *Johnson v. Robison*, 415 U.S. 361 (1974) because the government agency did not appeal the lower court's refusal to dismiss the complaint based upon failure to exhaust administrative remedies. *Id.*, 415 U.S. at 366 n.7. *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958) involved a state statute and a state administrative agency and is therefore inapplicable. Justice Harlan's concurring opinion in *Oesterich v. Selective Service Board*, 393 U.S. 233, 242 (1968) involved an agency that had no power to promulgate any regulations and is therefore inapplicable.

The legislation cited by Galaxy (Pet. App. C 92a-93a) does not excuse Galaxy's failure to make its argument before the Commission. Congress established the mandatory exhaustion requirement. Galaxy could have very easily preserved its position by objecting to the minority preference and giving a brief basis for its objection. The FCC could then have given its reasons why it believed the minority preference was constitutional. The other parties also would have been placed on notice that one of the criteria the Commission used to choose applicants was being challenged in this case. When Galaxy ignored the statutory requirement that it make its argument before the FCC, it deprived the FCC of an opportunity to respond to that argument at the agency level. In light of the explicit statutory exhaustion requirement and the lack of any valid reason why Galaxy could not have made its argument before the FCC, this Court must agree with the Court of Appeals that Galaxy waived its right to challenge the minority preference.

D. Dr. Stamps' Casual Reference To Self-Incrimination Does Not Mean He Refused To Answer Questions Or That The FCC's Decision Is Not Supported By Substantial Evidence

In its final argument, Galaxy alleges that the FCC's decision is not supported by substantial evidence because Dr. Herman Stamps, Anchor's general partner, allegedly refused to answer two questions and invoked the privilege against self-incrimination. Pet. 17-20. Galaxy's argument is based upon a highly misleading excerpt of the hearing transcript and ignores the plain import of the FCC's and the Court of Appeals' rulings.

A complete excerpt of the portion of the transcript section in question is provided as Appendix B to this opposition. That

excerpt reveals that after Galaxy's counsel made his comment about the "real world", he asked the Administrative Law Judge to direct Dr. Stamps to answer. The Administrative Law Judge refused to do so because he saw "no purpose in these general questions" and directed counsel to ask more specific questions. App. B 5a. Anchor cannot be faulted for not directly responding to a question that the Administrative Law Judge found improper. With respect to Dr. Stamps' casual reference to self-incrimination, Galaxy waived any right to complain about the responsiveness of Dr. Stamps' answer because it never asked the Administrative Law Judge to require Dr. Stamps to give a more complete answer. App. B 7a. Galaxy's petition fails to inform the Court of these important facts which show that Dr. Stamps never refused to comply with an Administrative Law Judge's order to answer a valid question.

In any event, the FCC thoroughly reviewed the testimony in question and found substantial evidence to support its ruling. Pet. App. B 18a-21a. Contrary to Galaxy's assertion that Dr. Stamps would have admitted he would have discussed station business with his limited partners (Pet. 20), the FCC reviewed testimony of all four of Anchor's partners and found that they all testified they would honor Anchor's limited partnership agreement. Pet. App. B 21a. The Court of Appeals referred to that testimony and affirmed the FCC's treatment of the testimony in issue "as the overly careful responses of a witness worried about unforeseen hypotheticals during cross-examination". Pet. App. A 9a n.5. No actual privilege against self-incrimination was ever invoked. Under these circumstances, the question of whether the FCC's decision was supported by substantial evidence was a routine determination that hardly constitutes an important federal question worthy of this Court's attention.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Date: July 2, 1992

APPENDIX A

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In re Applications of	)	MM DOCKET NO. 87-504
	)	
ANCHOR BROADCASTING LIMITED PARTNERSHIP	)	File No. BPH-860917MD
	)	
GALAXY COMMUNICATIONS, INC.	)	File No. BPH-860918NY
	)	
SUSAN M. BECHTEL	)	File No. BPH-860918OV
	)	
For Construction Permit for a New FM Station on Channel 250A in Selbyville, Delaware	)	

To: The Commission

COMMENTS

Galaxy Communications, Inc., by its attorneys, hereby offers the following comments in response to the *Order* of the General Counsel, FCC 92I-015, released March 16, 1992.[1] In *Bechtel v. FCC*, Case No. 91-1112 (D.C. Cir. Jan. 31, 1992), the United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings to address Susan Bechtel's arguments

[1]As discussed in Galaxy's Request for Extension of Time, filed April 2, 1992, the copy of the *Order* designated for Galaxy's counsel was erroneously sent to an address from which counsel moved almost three years ago. Therefore, Galaxy had no knowledge of the *Order* until it received the Comments of the other parties, who kindly consented to Galaxy's filing of these Comments at this time.

challenging the continued use of the integration criterion under the standard comparative issue. In the March 16 *Order*, the General Counsel sought the comments of the parties as to the appropriate action to be taken in the wake of that remand.

Following the remand, the Commission at an open meeting held on March 12, 1992, initiated a rule making proceeding in GC Docket 92-52 looking toward modification or even elimination of the integration criterion. While the text of the Commission's rule making notice has not yet been released, it appears from the press release of that action that the Court's decision in *Bechtel* has raised doubts within the Commission as to the validity of the management participation as an overarching, all-determinative factor in comparative proceedings. The press release also indicates that the Commission's current intention is to apply whatever modifications it may make to its policies on comparative criteria on a prospective basis only.

Galaxy submits that if the Commission now finds that integration of ownership and management is not as important as it was once perceived to be, it cannot, in light of the Court's mandate, apply that result only on a prospective basis. Bechtel, in her appeal, argued for a change in Commission policy as applied to her own proposal. It would hardly work justice for the Commission to concede that Bechtel was right, and that it should not keep integration of ownership and management as a factor of overwhelming importance, while continuing to do so in this very case. Indeed, if the Commission should determine that there is only a tenuous link between owner participation in management and station performance, it cannot justify perpetuation of the grant to Anchor.

At the same time, Galaxy does not agree with Bechtel's contention that the integration criterion should be scrapped altogether. Contrary to Bechtel's assertion, there have been numerous cases where station owners have fulfilled integra-

tion commitments, and have proven more responsive to the needs of the community than would have been the case for absentee owners. Therefore, Galaxy suggests that the Court's mandate may be fulfilled through a thorough review of the comparative criteria, and by certain sensible readjustments.

Thus, for example, as Galaxy will propose in comments to be filed in the general rule making, the Commission should return to its pre-1965 policy of awarding substantial credit for local residence independent of integration credit. A station owner who has lived in the community of license has gained a knowledge of the community's needs which will be reflected in station programming even if the owner is not physically at the station the minimum twenty hours per week required for integration credit. Consequently, local residence ought to be recognized in a significant way independent of integration credit.

Similarly, the Commission should make clear that where an applicant has engineered its proposal to cover 15 percent or more greater population than its competitors, that applicant deserves a preference similar in weight to the integration criterion. Obviously, it cannot mean much for residents who lack *any* service from a station to know that its owner is happily spending forty hours per week at the studio. Such a substantial difference in comparative coverage should be treated as a preference of equal importance with a mere qualitative enhancement of full time integration credit.[2]

While the above constitutes the core of Galaxy's views as to the appropriate disposition of this case in the wake of the Court's action, Galaxy recognizes that other parties may not

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[2]In this regard, Galaxy notes that Bechtel pressed its advantage for comparative coverage throughout this proceeding. However, Bechtel's site is across the road from that proposed by Galaxy. Accordingly, the differences between Bechtel and Galaxy are very slight, whereas both Bechtel and Galaxy have a substantial advantage over Anchor.

have interpreted the General Counsel's *Order* as calling for any views as to the substantive issues posed by this case. Therefore, it would appear most appropriate for the Commission to withhold further action in this case until it has decided whether and to what extent to modify the use of the integration criterion generally. Upon the conclusion of the general notice and comment proceeding, the Commission should immediately call for briefs as to the application of the Commission's new policy to this proceeding. Once the Commission has the benefit of the comments and deliberations prompted by the remand, both the Commission and the parties will be in a far better position to assess and address the appropriate outcome of this particular case. Only then can the Commission stand on firm ground in defending that outcome before the courts.

Respectfully submitted,

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April 6, 1992

APPENDIX B

*****

Q. Well, what is your expectation about how the actual relationship among the partners is going to work?

A. Well, I am afraid to answer that question because I know what is expected of me by law. Now, when you say talk about, well, you know, like somebody might yell down the street something and that might constitute talking about it. So I don't know how to answer that question according to the law.

I mean there's a real world, and then there's this. Right here I am going by this.

Q. But in the real world you expect that you probably will have —

A. I would not admit that any darn way.

Q. Excuse me?

A. I would never answer you on that one, sir.

MR. WOOD: I direct the witness to answer, your Honor.

MR. COHEN: First of all, your Honor, I don't think the question was asked, so I don't know what the witness was answering. Mr. Wood was interrupted by the witness —

JUDGE CHACKIN: Mr. Wood, if you want to ask some specific questions, and ask them if he construes, or it's his understanding that this provision would bar that, or permit that, you can do so. I see no purpose in these general questions. If you want to come up with some kind of hypothesis you can ask him that question. He has this language in front

of him and you can ask would that bar him from doing that and his understanding.

BY MR. WOOD:

Q. If you were to meet with Dr. Smith for instance in a party at his home I believe Portal Road, and there were other individuals that are present who wanted to know about the station in Selbyville, would this provision bar Dr. Smith from talking to these other people in your presence about what was going on with the station in Selbyville?

A. This provision does not bar Dr. Smith from talking to anybody else.

Q. Well, what about when you are present?

A. In my presence? I can't stop him from talking to somebody else. I don't read that in here.

Q. Well, you can't stop him from talking to you either about the station affairs, right?

A. That's true. Stop. But "communicate" would imply an exchange.

Q. But you do intend to talk to him about the business of the station, don't you?

A. Not according to this, no. This says nor shall any communication between the general partner or other partnership on matters of day to day operations.

Now, you can talk about the outside of the business but not the day to day operations of this or any other media enterprise. I think I understand the restrictions. It is a tightrope.

Q. But realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station if you are having problems with a

particular employee, or you wanted to change the format or anything like that, that you are going to end up talking to these partners about those things, if you happen to meet them in a social —

A. I don't know which amendment there is about possible self-incrimination, but I certainly wouldn't answer "yes." I would stick to what this says. I always have control of the second side of communication.

Q. What does it mean then that paragraph on page 10 where it says no limited partner shall act as an employee, agent, contractor of consultant of the partnership?

A. That should be "or consultant."

MR. COHEN: That's a typographical error which has been corrected, your Honor, but not on the record copies and I apologize. That's my error.

JUDGE CHACKIN: You want to know what that means?

MR. COHEN: I think he has answered the question, because it didn't make sense the way I read it.

JUDGE CHACKIN: All right.

BY MR. WOOD:

Q. Do you view this, Dr. Stamps as something of a false distinction that's been imposed on you here by the FCC's requirements to set this thing up in a way that's not in accordance with the way the four of you would normally conduct business?

MR. COHEN: I don't understand the question. I object to the form of the question, your honor.

JUDGE CHACKIN: Sustained.

MR. WOOD: All right. Let me rephrase it.

BY MR. WOOD:

Q. Do you view this restriction set forth here as to the ability of the limited partners to communicate with you on matters pertaining to the day to day operation as an unrealistic constraint that's been imposed upon the partnership by FCC regulations?

A. Well, when I signed the bttom [sic] of this document I signed myself to liave [sic] under this provision. I don't see a restricton here as awkward as it may apparently be any different from SEC's regulations dealing with inside trading or anything else. A lot of these things must be controlled by laws I have to subscribe to. This is what I want. I can live with them.

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